

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 April 2006

Case No. 2004 LHC 02729

OWCP No. 5-116459

In the Matter of

EARL A. WITTS, JR.,
Claimant
v.

NEWPORT NEWS SHIPBUILDING AND
DRY DOCK COMPANY,
Employer,

Appearances:

Matthew W. Smith, Esq., for Claimant
Richard B. Donaldson, Jr., Esq., for Claimant
Benjamin M. Mason, Esq., for Employer

Before:

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for compensation from an injury alleged to have been suffered by Claimant, Earl A. Witts, Jr., covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (hereinafter referred to as the "Act"). Claimant alleges that he injured his left knee in a June 3, 2003, accident while employed by Employer, Newport News Shipbuilding and Dry Dock Company; and that as a result he is in need of arthroscopic surgery.

The claim was referred by the Director, Office of Workers' Compensation Programs, to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was commenced on February 28, 2005. (TR. at 1).¹ Claimant submitted 13 exhibits, identified as CX 1- CX 13, which were admitted without objection. (TR. at 15). Employer submitted 15 exhibits, EX 1 through EX 15, which were admitted without objection. (TR. at 15). By agreement of the parties, the hearing was not completed due to the need for additional evidence. However, the parties agreed that the evidence was complete on the issue of whether Claimant suffered a compensable left knee injury on

¹ EX - Employer's exhibit; CX- Claimant's exhibit; and TR - Transcript.

June 3, 2003, and requested that an interim decision be made on that issue, because of the need for a determination as to who would pay for surgery. Therefore the parties were asked to submit post-hearing briefs regarding this sole issue by March 21, 2005. Employer submitted its brief on March 22, 2005, and Claimant submitted his brief on March 24, 2005. On July 1, 2005, the parties were advised by memorandum that the final decision would include a finding that the left knee injury was not compensable under the Longshore Act.²

As to the remaining issues, the parties agreed that a supplemental hearing should be conducted after additional medical evidence was developed. A supplemental hearing was scheduled for September 7, 2005. However, the hearing was canceled at the request of the parties as their development of evidence was not complete. The hearing was not rescheduled as the parties have requested additional time. On April 26, 2006, Counsel for Employer submitted by facsimile additional stipulations that have been reached as to some of the additional issues. This Decision and Order addresses the issues of whether Claimant's left knee injury is compensable and also implements the additional stipulations of the parties. This decision does not address the remaining issue of whether Claimant is entitled to permanent total disability after January 7, 2004. The parties may request a future hearing on that issue.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

At the hearing, Claimant and Employer stipulated:

1. That an Employer/Employee relationship existed at all relevant times;
2. That the parties are subject to the jurisdiction of the Longshore and Harbor Workers Compensation Act;
3. That the Claimant sustained an injury to his right knee, right hand and right wrist on June 3, 2003 arising out of and in the course of his employment;
4. That Claimant alleges that he also sustained an injury to his left knee arising out of and in the course of his employment on June 3, 2003;
5. That a timely notice of injury was given by the Claimant to Employer;
6. That a timely claim for compensation was filed by the Claimant;
7. That the Employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion;

² The parties agreed that the actual decision on the left knee should not be issued at that time to avoid an issue as to timeliness of any future appeals.

8. That the average weekly wage at the time of his June 3, 2003 injury was \$782.78, which yields a compensation rate of \$521.85;
9. That Claimant has been paid temporary total disability as a result of the June 3, 2003 injury from June 4, 2003 to April 25, 2003 inclusive and from April 27, 2004 to May 20, 2004 inclusive, in the total amount of \$26,167.05 as evidenced by Employer's Exhibit 15.
10. That as of January 28, 2005, Claimant has a wage earning capacity based on his actual wages at Farm Fresh, which is \$6.50 an hour for about 20 hours a week.³

On April 26, 2006, Counsel for the Employer submitted by facsimile additional stipulations that have been reached as to some of the additional issues. Because the additional stipulations are submitted in letter form, the content of the letter is recited herein verbatim:

11. This letter is meant to outline the events on this claim which are agreed to by the parties. The case came on for trial before you on February 28, 2005. One of the issues was Claimant's entitlement to a 13% permanent partial disability based on an impairment rating given to Claimant by his treating physician, Dr. Stiles, on January 7, 2004 (EX 1g). The parties agree to the entry of an Order for the 13% permanent partial disability rating. Another issue was whether Claimant was entitled to ongoing medical treatment for his right arm complaints based on the June 13, 2003 injury. The parties agree that treatment for Claimant's right arm injuries is related to his work-related crush injury occurring on October 13, 1986 (OWCP No. 5-59857). Claimant also seeks an award of temporary total disability from June 4, 2003 and continuing until he obtained employment on June 28, 2005 and temporary partial disability from that point forward. Although Employer has agreed to pay or has been ordered to pay temporary total disability to the Claimant for these periods under the Virginia Workers' Compensation Act, Employer cannot agree to an Order for the payment of temporary total disability past January 6, 2004 based on Dr. Stiles' opinion that Claimant reached maximum medical improvement on January 7, 2004 (EX 1g, EX 4 page 8).

In summary, I believe that the parties can agree that treatment for Claimant's right arm injury is not related to his June 3, 2003 injury but is related to his October 13, 1986 injury and that ongoing treatment for the complaints in his right arm are covered under that injury, that Claimant is entitled to temporary total disability from June 4, 2003 through January 6, 2004 and that Claimant is entitled to an award for permanent partial disability based on a 13% rating to Claimant's right leg as expressed by

³ TR. at 14.

Dr. Stiles on January 7, 2004. This Administrative Law Judge would still, therefore, have to decide whether Claimant's left knee complaints are related to the June 3, 2003 injury. A decision on whether Claimant is entitled to permanent total disability after January 7, 2004 is not before this Administrative Law Judge at this time.

I trust that this information is helpful in concluding this matter as it currently stands before you. I have discussed the contents of this letter with Rick Donaldson prior to delivering it to you and he has reviewed the letter and agreed to its contents.

DISCUSSION OF LAW AND FACTS

Testimony of Claimant

Claimant testified that at the time of his accident, he had been employed as a sheet metal worker for Employer. (TR. at 18). Claimant explained that he was responsible for welding up ventilation in the hull of a ship. (TR. at 18). Claimant noted that this position required "[c]limbing, lifting, pulling, climbing ladders." (TR. at 18).

Claimant was involved in a work-related accident on June 3, 2003. (TR. at 17). Claimant described the incident:

I was coming out the men's room on the IKE, and upon coming out of the rest room, I fell off the steps. The stairs didn't have any handrails on it. I believe if they had handrails, I probably could have caught myself, but anyway, I fell off the steps and landed on my right hand and my right knee, and that is what happened.

(TR. at 17). Claimant estimated that he fell 3½ feet onto the deck of the ship. (TR. at 17). Claimant reiterated, "I came down on my right knee and my right hand at the same time. All my weight was on my knee and my right hand at the same time." (TR. at 17). Claimant noted that he felt pain in both his right knee and his right hand at this time. (TR. at 17).

Shortly following this accident, Claimant sought treatment from Dr. Stiles. (TR. at 19). Claimant testified that he underwent surgery for his right knee, and followed this procedure with 10 to 11 months of physical therapy. (TR. at 19). Claimant noted that although he had improvements with his right knee, he continued to have problems with it as of the time of testimony. (TR. at 19).

Claimant testified that he began having problems with his left knee in October 2003. (TR. at 21). Claimant noted that he did not have problems with his left knee prior to his June 3, 2003, accident. (TR. at 38). Claimant testified that Dr. Stiles recommended therapy for the left knee, but this proved ineffective. (TR. at 21). Dr. Stiles also sent Claimant for an MRI, which found swelling under Claimant's kneecap. (TR. at 21). Claimant recalled that Dr. Stiles attributed this to "all the weight bearing from [his] right knee." (TR. at 21).

Claimant testified that he attended therapy for approximately three hours a day following his surgery. (TR. at 37). When asked about the other things that he did following his procedure, Claimant explained:

When I first had the surgery, I just stayed around the house. Every now and then I would – I would get out. I didn't – I couldn't go too many places, but I would ride from time to time with my wife. You know, I couldn't drive.

(TR. at 37).

Claimant approximated that he used crutches for three to four months following his right knee surgery (TR. at 22, 36). Claimant noted that once he got rid of the crutches, he continued to favor his right knee. (TR. at 22). At the time of his testimony, Claimant noted that he wore braces on both knees. (TR. at 22). Claimant testified that Dr. Stiles had recommended surgery on his left knee. (TR. at 23).

Medical Evidence

Medical Records of Dr. Thomas Stiles

Claimant initially consulted Dr. Stiles, a board-certified orthopedist, on June 11, 2003. (CX 2; EX 1a). Dr. Stiles noted that Claimant had “injured his right knee a week or so ago when he went to get up and something snapped in his knee,” and recommended Claimant undergo surgery. (CX 2). Claimant returned for a follow-up visit on July 7, 2003, at which time Dr. Stiles noted that Claimant “had surgery with a partial lateral meniscectomy, excision of a large supatella plica and chondroplasty of the medial femoral condyle.” (CX 2; EX 1b). Claimant was advised to utilize crutches following his surgery. (CX 2; EX 1b). Claimant continued to have problems with swelling in his right knee, and on July 14, 2003, Dr. Stiles noted that “[h]is knee was blocked and aspirated and approx. 70 cc of bloody fluid was removed.” (CX 2; EX 1c).

Claimant initially complained of left knee pain during his October 29, 2003, visit with Dr. Stiles. (CX 2; EX 1d). Specifically, Dr. Stiles noted:

He is complaining of pain in his left knee and he definitely has a click with flexion extension beneath his patella. He was questioned about his left knee and he tells me that he had no other problems with this knee prior to his right knee problem and surgery.

It is my opinion that his left knee problem he is experiencing is a result of his injury and he is depending on his left leg for increased workload as a result of his right knee surgery. He was advised to go to the NNSY clinic and report his left knee problem.

(CX 2; EX 1d). Dr. Stiles testified that it was at this point Claimant informed him that he had actually fallen on both knees during his work-related accident, although this allegation was not included in Dr. Stiles' office notes. (CX 12-6; EX 3-6).

Dr. Stiles' notes dated November 13, 2003, reveal the following:

[Claimant] also complains of pain in his left knee. He has had a MRI ordered by [Employer] for this knee. (EX 9). He is taking his Vioxx and it seems to be helping somewhat. He has quit taking all narcotic type medicines.

He has been to [Employer's] clinic for his left knee and he was told there was nothing wrong with it but only swelling. I wonder what is causing the swelling if there is nothing wrong with it.

On examination of his left knee, he has pain and a loud click with patella manipulation, particularly with pressure on the superior pole. It is my opinion that he has a chondromalacia of the patella in his left knee and that his problem with his right knee and his having to been on-weight bearing and then on crutches, has definitely precipitated pain and difficulty with his left knee.

His MRI of his left knee was reviewed and I did not see any tears in his menisci or areas of bone bruising or destructive lesions. Advised to continue with his therapy.

(CX 2).

Dr. Stiles reiterated his opinion in his November 19, 2003, notes that Claimant's "problems with his left knee are a result of overuse secondary to the injury to his right knee." (CX 2; EX 1e). Additionally, Dr. Stiles noted:

[Claimant] also injured his left knee at the same time he injured his right knee. He apparently fell coming down some stairs, landed on his right wrist and both knees. He had excruciating pain on the right side originally and was treated for this. He was on crutches for a period of times. Once he got off his crutches, he began having pain and difficulty with the left knee. He had an MRI on the left side but shows fluid within his left knee but fails to show a meniscal tear or ligaementous tear.

On examination, he has crepitation with a loud snap with patella manipulation and he has pain with flexion extensions as well. It is my opinion he is developing a chondromalacia of the patella on the left side which is a direct result of his injury, namely all his weight coming down on both knees, forcing his patella back against the femoral condyle behind it, thus causing a shear force in the cartilage in this area and causing some splitting and loss of fluid.

(EX 1e). Dr. Stiles' notes dated December 4, 2003, state that Claimant was "getting an occasional click and catches in this left knee." (CX 2; EX 1f)

On January 7, 2004, Dr. Stiles assigned Claimant a 13% impairment rating of his right lower extremity as a result of his knee injury. (CX 2; EX 1g). Dr. Stiles noted that Claimant had "marked quadriceps atrophy in this [right] leg and considerable muscular weakness." (CX 2; EX 1g).

Claimant again consulted Dr. Stiles on June 17, 2004, complaining of pain in both knees, "with catching, popping and acute giving way." (CX 2; EX 1L). Dr. Stiles noted:

[Claimant] has had a chondroplasty of his right knee and it is giving him a moderate amount of pain but he is getting increasing amounts of difficulty with his left knee in the nature of popping, catching and giving way. He does have a history of injuring both knees in a shipyard accident. He has considerable crepitation with flexion extension with a definite McMurray's on the left a mild effusion in both knees.

(CX 2; EX 1L). Claimant was sent for an MRI on both knees, and Dr. Stiles marked Claimant out of work since the "amount of problems he [was] having with arm and both his knees makes him unable to do any type of physical labor." (CX 2; EX 1L). Dr. Stiles reported on July 1, 2004, that the MRI showed that Claimant "has patella tendonitis bilaterally." (CX 2; EX 1m).

Dr. Stiles recorded on July 29, 2004, that Claimant was "experiencing severe pain in the post patella area, particularly on the left knee. He is still getting some symptoms on the right knee but not near to the point that he does on the left." (CX2; EX 1m).

Claimant's complaints of left knee pain continued during his August 26, 2004, visit with Dr. Stiles. He again noted symptoms of snapping, popping, and occasional giving away. (CX 2; EX 1n). Dr. Stiles noted:

On examination of his left knee, he has a loud snap with patella manipulation, which is quite painful. He has a mild effusion without heat or redness. The possibility of doing surgery on this knee was discussed with him. He would like to go ahead and have surgery on this knee.

(CX 2; EX 1n).

Claimant reported to Dr. Stiles on September 23, 2004, that he felt that the cracking and popping in his left knee had gotten worse. (CX 2; EX 1n). Dr. Stiles noted that Claimant was scheduled for a second opinion on his left knee. (CX 2; EX 1n). Dr. Stiles further noted that he recently underwent a deposition, where it came up that Employer "wondered if [Claimant] would go back to light duty as far as his left knee is concerned." (CX 2; EX 1n). Dr. Stiles stated that "[Claimant] was given restrictions today for both knees if they have a place for him to work." (CX 2; EX 1n). Dr. Stiles testified during the deposition that these restrictions would be the same as those he imposed on the right knee. (CX 12-10; EX 3-10). Dr. Stiles testified that he

felt Claimant was not ready to return to work under these restrictions until August of 2004. (CX 12-16; EX 3-16).

At the time of his deposition, Dr. Stiles testified that he was “preparing to orthoscope [Claimant’s] left knee but he was having a second opinion about that from the Shipyard,” from which they were awaiting results. (CX 12-16; EX 3-16). Dr. Stiles explained that he recommended Claimant undergo an arthroscopy because “[h]is MRI shows that he has chondromalacia of his patella, which is symptomatically relatively severe.” (CX 12-17; EX 3-17). Dr. Stiles reiterated that he felt that these left knee issues were related to Claimant’s June 3, 2003, work accident. (CX 12-17; EX 3-17).

Dr. Stiles’ notes dated October 21, 2004 recorded that:

[Claimant’s] left knee continues to be a problem with catching, popping, and occasional giving way. He definitely has painful manipulation of his patella today and some mild swelling. It is my opinion that we should arthroscopy his knee and do achondroplasty of his patella. This will be scheduled once it is approved.

(CX 2). In the meantime, Claimant began using knee braces to help his pain. (CX 2).

Medical Records of Dr. P.S. Apostoles

Dr. Apostoles examined Claimant on November 4, 2003 at the [Employer’s] Clinic. Claimant reported to Dr. Apostoles that “his left knee became painful about two months ago.” (EX 4). Dr. Apostoles further recorded that Claimant informed him that:

[H]e did not injure his left knee initially, but believes the symptoms are secondary to favoring his right knee while he was on crutches. He describes popping in his left knee and primarily femoral symptoms.

(EX 4). A physical exam of Claimant’s lower left extremity revealed “range of motion 0-125°, stable to varus/valgus stress, negative McMurray’s, negative drawer, negative Lachman’s, positive patella grind.” (EX 4). Additionally, an x-ray showed that the joint space in Claimant’s left knee was well maintained. (EX 4). Based upon his physical exam, Dr. Apostoles suspected that Claimant suffered from patella femoral pathology, and recommended Claimant undergo an MRI. (EX 4).

Dr. Apostoles reviewed Claimant’s MRI results on November 10, 2003. Dr. Apostoles made the following findings:

The MRI of his left knee showed no evidence of meniscal pathology, with only a small joint effusion. Based on the negative MRI, I would recommend returning [Claimant] to work with standard knee restrictions. He will follow up with me on a prn basis. I suggested he speak to his Case Manager to discuss potential follow up with Dr. Stiles for his left knee complaints.

(EX 5). Dr. Apostoles explained that the standard knee restrictions included “no crawling, kneeling or squatting. Minimal walking, keep stairs and ladders to a minimum.” (EX 5).

Medical Records of Dr. Cohn

Dr. Cohn, an orthopedist, evaluated Claimant on September 28, 2004, regarding his left knee. Claimant informed Dr. Cohn that he had fallen down some steps at work, and as a result underwent a surgical procedure in July 2003 on his right knee. (EX 7a). Claimant explained that he had suffered from symptoms of popping, grinding, and achy pain, and that these have returned to his right knee over the past few months. (EX 7a).

Claimant further informed Dr. Cohn that he had developed significant symptoms in his left knee in the five to six months prior to his consultation. Dr. Cohn noted that Claimant “complains of pain anteriorly at the superior pole in his patella. He has pain even with ambulation and complains of intermittent swelling.” (EX 4a).

Dr. Cohn performed a physical examination of Claimant and noted that he stands with normal alignment and could squat to 45 degrees with some pain and crepitus. (EX 4a). Dr. Cohn noted that Claimant’s knees were stable to exam, but he did “have patella crepitus with popping sensations anteriorly.” (EX 4a). Dr. Cohn further noted that Claimant’s patella compression was positive. (EX 4a).

Dr. Cohn detailed Claimant’s MRI findings:

He has had two MRIs on his left knee. One in November 2003 which revealed a small joint effusion but otherwise felt to be normal. There is another MRI on 06/24/04 which was felt to be unremarkable with again the exception of a small joint effusion and edema around the inferior pole of the patella compatible with mild patella tendonitis.

(EX 4a).

Following his evaluation, Dr. Cohn recorded his impression as “[Claimant] most likely has patellofemoral chondral lesions of both knees.” (EX 4b). Dr. Cohn further stated:

I do not feel that the left knee is in any way connected with his work injury. He states he fell upon his right knee. There were no initial reports of left knee symptoms. Since he has hurt his right knee he has not returned to work and is reported relatively sedentary. Therefore, this would actually decrease any stress upon his left knee compared to the state he would be in had he not injured his right knee and stopped working. His picture is compatible with advancing arthrosis of his patellofemoral joints which would be a degenerative medical problem.

(EX 4b).

Section 20(a) Presumption

Section 20(a) of the Act, 33 U.S.C. § 920(a), creates a presumption that a claimant's disabling condition is causally related to his employment. In order to invoke the § 20(a) presumption, a claimant must prove that he suffered a harm and that conditions existed at work or an accident occurred at work that could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards, Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). Claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the § 20(a) presumption. See *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom, Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS (5th Cir. 1982). Once the claimant has invoked the presumption, the burden of proof shifts to the employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the Administrative Law Judge must weigh all the evidence and render a decision supported by substantial evidence. See *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935).

Claimant has shown that he has suffered a harm in his left knee. Since October 29, 2003, Claimant has suffered from left knee problems. Further, Claimant has shown that a work accident occurred that could have caused this injury. The parties have stipulated that Claimant was involved in a work-related accident in June 3, 2003. (JX 1). Additionally, Dr. Stiles opined that Claimant's left knee problem is a result of this incident. (CX2; EX1d). Employer effectively concedes in its post-hearing brief that Claimant has submitted evidence that may be sufficient to invoke the § 20(a) presumption. (Employer's brief at 7).

Upon consideration of the evidence as well as the stipulations entered into by the parties, I find that Claimant has established a *prima facie* case for compensation and is entitled to the presumption of § 20(a) that his condition is causally related to his working conditions. The burden thus shifts to Employer to rebut the presumption with substantial countervailing evidence.

Rebuttal of Section 20(a) Presumption

Since the presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that the claimant's employment did not cause, contribute to, or aggravate his condition. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989); *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. *E & L Transport Co., v. N.L.R.B.*, 85 F.3d 1258 (7th Cir. 1996).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by § 20(a). See *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and employment.

Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 144 (1990). If the Administrative Law Judge finds the § 20(a) presumption is rebutted, he must weigh all the evidence and resolve the causation issue based on the record as a whole. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984); *Devine v. Atlantic Container Lines, G.T.E., et. al.*, 25 BRBS 15, 21 (1991). When the evidence as a whole is considered, the proponent of the evidence has the burden of proof. See *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 42 (CRT) (1994).

In rebuttal, Employer offers the opinion of Dr. Cohn, who opined that Claimant's left knee injury is not the result of his June 3, 2003, injury. (EX 4b). Dr. Cohn found important Claimant's lack of initial reports of left knee symptoms. Dr. Cohn further highlighted in support of his opinion that since his accident, Claimant had not returned to work, and had remained relatively sedentary. Dr. Cohn opined that this would actually decrease any stress upon his left knee. Dr. Cohn concluded that Claimant's left knee pain "is compatible with advancing arthrosis of his patellofemoral joints which would be a degenerative medical problem." (EX 4b).

It is well established that "[t]he unequivocal testimony of a physician that no relationship exists between a claimant's disabling condition and the claimant's employment is sufficient rebuttable evidence" to overcome the § 20(a) presumption. *Flood v. NAF Billeting Branch*, 134 F.3d 363 (4th Cir. 1998) (table decision) (citing *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129-30 (1984)). Dr. Cohn concluded after an examination of Claimant and a review of Claimant's medical records that there is no causal relationship between Claimant's working conditions and his knee disability. Additionally, Dr. Cohn opined that Claimant would have required a total knee replacement regardless of his employment conditions. Because of this unequivocal medical testimony, I find that Employer has presented substantial evidence which, if credited, could establish that the Claimant's working conditions did not accelerate or aggravate his disability. Therefore, I find that the Employer has rebutted the § 20(a) presumption.

Weighing the Evidence

As stated above, because the presumption no longer controls, the evidence must now be examined and weighed as to the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935). The presumption "never had and cannot acquire the attribute of evidence in the claimant's favor." *Id.* Therefore, it must be determined whether Claimant has shown by a preponderance of the evidence that the alleged injury is causally related to his employment with Employer. 5 U.S.C. §556(d) (2002); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 277 (1994) (citing *Steadman v. SEC*, 450 U.S. 91, 95 (1981)); *Devine v. Atl. Container Lines, G.I.E.*, 25 BRBS 16, 20-21 (1990).

As previously discussed, Claimant offers the medical opinion of Dr. Stiles in support of a finding that his left knee injury is causally related to his June 3, 2003, work accident. Dr. Stiles attributes the left knee problem to the June 3, fall by explaining that Claimant's "left knee problem [. . .] is a result of his [right knee] injury and that he is depending on his left leg for increased workload as a result of his right knee injury." (CX 2). Dr. Stiles also states that Claimant has a "chondromalacia of the patella in his left knee and that this problem with his right knee and his having been non-weight bearing and then on crutches, has definitely precipitated pain and difficulty with his left knee." (CX 2). On November 19, 2003, Dr. Stiles described the

etiology of the left knee condition as being a “direct result of [Claimant’s right knee] injury, namely all his weight coming down on both knees, forcing his patella back against the femoral condyle behind it thus causing a shear force in the cartilage in this area and causing some splitting and loss of fluid.” (CX 2). Claimant argues that Dr. Stiles’ opinion is supported by his testimony that he did not have left knee problems prior to his fall at work, and that it was a few months after the fall that his problems began.

Claimant further notes that he had informed Dr. Apostoles that he did not injure his left leg initially, but felt it was secondary to favoring his left knee while he was on crutches. Claimant highlights that Dr. Apostoles fails to discuss the etiology of his left knee condition despite his allegations. (CX 5).

As discussed above, Employer has offered Dr. Cohn’s opinion to counter a finding of a causal link between Claimant’s left knee problems and his June 3, 2003, work-related accident. Dr. Cohn specifically opined that Claimant’s left knee complaints are not related to his June 3, 2003, injury. Claimant had informed Dr. Cohn that he had fallen on his right knee, and Dr. Cohn noted the lack of initial reports of left knee symptoms. (EX 4b).

Employer also highlights Dr. Stiles’ November 19, 2003, opinion, and argues that it is unsupported by the facts of this case. In this opinion, Dr. Stiles determined that Claimant’s left knee problems began when he fell on *both* knees, thereby “forcing his patella back against the femoral condyle behind it thus causing a shear force in the cartilage in this area and causing some splitting and loss of fluid.” (CX 2). However, as Employer notes, Claimant has consistently stated that he came down on his right knee when he fell on June 3, 2003. Notably, on the Report of Occupational Injury, dated June 3, 2003, Claimant’s statement reads “I was coming out of the bathroom and fell off the steps and hurt my *right* knee and right hand.” (CX 5; EX 10) (Emphasis added). Additionally, Claimant, himself, admitted to Dr. Apostoles that he did not injure his left knee initially. Notably, Claimant also testified at the hearing that he had fallen on his right knee and right arm. (TR. at 17). There is no evidence in the record that Claimant alleged that he had also landed on his left knee in the fall until October 29, 2003, the date upon which Claimant initially complained of left knee problems. Dr. Stiles testified that it was at this point, nearly five months after the accident, that Claimant informed him that he had actually fallen on both knees during his work-related accident. (CX 12-6; EX 3-6). Because of this delay and because of his subsequent conflicting testimony, Claimant’s inconsistent recollection of the events of June 3, 2003, and the history he provided Dr. Stiles, is unreliable. As Dr. Stiles’ opinion of the etiology of Claimant’s left knee problems is based upon this shifty recollection, it is entitled to no weight.

Also entitled to no weight is Dr. Stiles’ opinion that Claimant’s right knee injury caused him to overuse his left leg, further triggering his left knee problems. Claimant simply fails to offer evidence of overuse of the left knee. As highlighted by Employer, Dr. Cohn indicated that Claimant did not return to work following his June 3, 2003, accident, and has remained relatively sedentary. (CX 2). Claimant, himself, testified at the hearing that he did little other than go to physical therapy following his June 3, 2003, accident and subsequent right knee surgery. (TR. at 37). I find reasonable Dr. Cohn’s opinion that indicates being sedentary would actually decrease any stress upon the left knee as opposed to having increased the stress upon the left knee.

Employer further highlights that Claimant had testified in the hearing that he had used crutches following his right knee surgery. (TR. at 37). Employer argues the use of these crutches specifically protects against overuse of the left leg. Dr. Stiles' blank statement that using crutches would trigger pain and difficulty with Claimant's left knee is not substantiated by any evidence in the record. Because the record is absent specific evidence of Claimant's overuse of his left knee stemming from the injury to his right knee, I find that Dr. Stiles' opinion is entitled to little weight. Rather, I credit the opinion of Dr. Cohn who found that Claimant's left knee injury is "compatible with advancing arthrosis of his patellofemoral joints which would be a degenerative medical problem." (EX 4b).

After reviewing all the evidence, I find and conclude that Claimant has failed to meet his burden of persuasion, by a preponderance of the evidence, that his left knee problems was caused or aggravated by his employment with Employer. As such, I find that he is not entitled to disability benefits under the Act for his left knee condition.

ORDER

Accordingly, it is hereby ordered that:

1. The Claimant is not entitled to compensation for his left knee injury under the Longshore Act;
2. The Employer shall pay to Claimant compensation for a 13% permanent partial disability based on an impairment rating given to Claimant by his treating physician, Dr. Stiles, on January 7, 2004 (EX 1g);
3. The Claimant is entitled to ongoing medical treatment for his right arm complaints based on the June 13, 2003, injury, which is found to be related to his work-related crush injury occurring on October 13, 1986 (OWCP No. 5-59857);
4. Employer shall pay to Claimant compensation for temporary total disability from June 4, 2003, through January 6, 2004, based on Dr. Stiles' opinion that Claimant reached maximum medical improvement on January 7, 2004 (EX 1g, EX 4, page 8);
5. A decision on whether Claimant is entitled to permanent total disability after January 7, 2004, is not before this Administrative Law Judge at this time and no finding is made with respect to that claim;
6. Employer is hereby ordered to pay all medical expenses related to Claimant's work-related injuries;
7. Employer shall receive credit for any compensation already paid;
8. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued

benefits and penalties, computed from the date each payment was originally due to be paid. See *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

9. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.⁴

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RICHARD E. HUDDLESTON
Administrative Law Judge

⁴ As this Judge will be retired by the time that the fee petition is filed, any fee request and objections will be assigned to another Judge for consideration.